

UGANDA / JUDGMENT

Patel v Patel (Civil Appeal 18 of 1996)

[1997] UGCA 21 (21 February 1997)

[1997] UGCA 21**COURT**

Court of Appeal of Uganda

BEFORE

Manyindo, DCJ, Engwau, J, Egonda-Ntende, J

CASE / FILE NUMBER

Civil Appeal 18 of 1996

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IN THE COURT OF APPEAL OF UGANDA**HOLDEN AT KAMPALA**

(CORAM: S. T. MANYINDO - DCJ, S. G. ENGWAU - J, EGONDA-NTENDE - J.) CIVIL APPEAL NO. 18 OF 1996

BETWEEN

BABUBHAI KALIDAS PATEL: :: :: APPELLANT AND HARIPRASAD RAMBHAI PATEL:

RESPONDENT JUDGMENT J: (Appeal arising from H. C. C. S. No. 981/96 High Court of Uganda at Kampala (Hon. Kireju, J.). at M. OF ENGWAU

counterclaim for The appellant's^s refund of purchase price, cost of renovations and extensions on the premises with interest and costs thereon was dismissed. This is an appeal against the decision of M. Kireju, J. in H. C. C. S. No. 981 of 199<J, dated 25-6-96, in which she allowed the respondent's claim for a declaration that he is entitled to 50% of the rent collected, vacant possession of 50% of the suit property with interest on the decretal sum and costs of the suit.

Road, Briefly the facts were that both the appellant and respondent were registered as Tenants in common in equal share in respect of Leasehold Register Volume No. 115 Folio No. 25 known as Plot No. 19 - Buganda Kampala.

common. Kashibhai Dahyabhai Patel, the former registered proprietor of the lands comprised in the above mentioned Folio in consideration of the sum of Shs. 270,000= (Shillings two hundred seventy thousand only) paid to him transferred the said property to the appellant and respondent as tenants in

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The appellant took The Transfer Deed - Exbt. Pl was registered on 7-2-72. One J. K. Patel - (DW2) by virtue of the power of attorney granted to him by the vendor, K. D. Patel, witnessed the document, possession of the property and started managing it.

He In 1972, the respondent left Uganda and went to live in India pursuant to the expulsion of the Asians by the Regime of the day. left a power of attorney with the appellant who was his close friend and Lawyer to manage the said property on his behalf.

The respondent claims that he paid 50% of the purchase price. When he demanded for the account of rent the appellant declined to comply on the ground that the respondent had not paid for his share of the property, that there was a mortgage and that the respondent had first to redeem his share before any disclosure could be made and secondly the respondent was merely a trustee (of the appellant's daughter) in respect of the 50% share.

And therefore, the respondent In The appellant claimed that he had paid the whole purchase price for the property and therefore he had an equitable mortgagee on the respondent's alleged interest in the property, by deposit of the Certificate of Title with the appellant. was not entitled to any claim on the property before redemption, view of that development, the respondent instituted in the High Court Civil Suit No. 981 of 1990, to which the appellant made a counterclaim.

The appellant prayed in the counterclaim that the respondent be ordered to pay for his share (50%) and in the alternative his name be cancelled from the Register as he had acquired the shares fraudulently. After a protracted trial, the suit was allowed in favour of the respondent and as already noted, the appellant's counterclaim was dismissed. Hence this appeal.

The appeal is based on ⁶ grounds, namely

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- 1. The learned trial Judge failed to properly evaluate the evidence adduced and/or ignored the clear evidence adduced by the appellant and hence erred when she held that the respondent had paid for his share of the suit property.
- 2. Having erred in concluding that the respondent had paid for half share of the suit property, the learned trial Judge erred in law in holding that no resulting trust was created in favour of the appellant where the appellant solely met the purchase price of the property.
- 3. The learned trial Judge erred in law when she held that the respondent had not got registered as owner of a half share of the suit property through fraud.

- 4. The learned trial Judge erred in law when she held there was an effectual power of attorney which could be revoked.
- 5. The learned trial Judge erred in law when she held that the respondent was entitled to a collected since 7th February 1972, half share of the rent or at all.
- 6. Having found out that the appellant had carried out renovations on the property, and having made the error referred to in ground No. 3 above, the learned trial Judge erred in law where she dismissed the appellant's counterclaim.

At the hearing of the appeal Mr. Nangwala, learned Counsel for the appellant argued the above grounds of appeal in their chronological order:

In ground one, and yet in another breath who was to pass it to J. K. Patel. Mr. Nangwala submitted that the learned trial Judge erred when she held that the respondent had paid for his half share of the suit property. It was his contention that that finding was not backed by any evidence on record. According to Mr. Nangwala the respondent had contradicted himself in that in one breath he had paid the purchase price to J. K. Patel, as advocete, for the vendor claimed he had paid the money to the appellant

When J. K. Patel was called as a witness (DW2), he denied having been paid any money by the respondent in respect of the suit property. In any case, the Counsel contended, the respondent as a nominee of the appellant could not deal directly with J. K. Patel. He (respondent) should have paid the purchase price to him (appellant) which he did not do.

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It The learned Counsel further argued that whereas in the Transfer Deed and the Certificate of Title both the appellant and the respondent are described as tenants in common in equal shares, the respondent did not make any contribution of his share on the property at all. He was merely nominated to hold in trust the property for the appellant's daughter or pay half the purchase price and be a co-purchaser. was contended by Mr. Nangwala that the respondent chose to be a trustee for the daughter of the appellant because he did not have money to pay for his share.

It was also the contention of the learned Counsel for the He therefore invited Court to look In the premises Mr. Nangwala argued that, evaluated the evidence on record appellant that the Transfer Deed Exbt. Pl was not detailed enough. It only showed that the vendor K. D. Patel had divested himself of the ownership he had in the property, but the deed does not disclose how Shs. 270,000= was paid, had the learned trial Judge properly she would have found that the respondent had not paid half of his share of the suit property or at all. for other evidence to decide who paid the purchase price. According to him the trial Judge should have held that the appellant was the sole purchaser of the suit property.

was to Mr. Rezida, Counsel for the respondent opposed the appeal and submitted that according to the evidence on record the respondent paid Shs. 135,000= of the purchase price to the appellant, B. K. Patel who was to pass it on to J. K. Patel the Lawyer for the seller.

At that juncture, and to our surprise, it was discovered that the proceedings of the Court were tampered with, especially with specific reference as to whom the respondent allegedly paid his share of the purchase price. Mr. Nangwala without hesitation confessed to having made the offending alterations on the proceedings and promised never to do the same again.

In fact in my view, Mr. Nangwala's action was in utter disrespect of his professional ethics. I believe that any error apparent on the Court proceedings can only be corrected by the presiding Judge when such errors are brought to his or her attention, this case there was no error to be corrected.

The capacity as an advocate, gave as a witness. standing and so was J. K. Patel who witnessed it. In his testimony J. K. Patel contradicted the very document which he witnessed in his That goes to the root of the evidence he Deed was drawn by the appellant who was a practising advocate of long it. Be that as it may, the learned Counsel for the respondent further argued that even if the evidence of J. K. Patel that the respondent did not pay his share of the purchase price is to be believed, still that evidence is at variance with the Transfer Deed Exbt Pl.

a document to that effect. The **Ratilal Gordhabhai Patel —v— Lalji** on the point. In the premises, the trial Judge was right to hold that J. K. Patel could not be heard to say that the respondent did not pay his share of the cost price of the suit property when he had witnessed The evidence of Mr. J. K. Patel showed, as found by the trial Judge, that he was not a credible witness, learned Counsel cited the case: **Makamji, [1957] E. A. 314**

in other words that it would not be acted upon, document he asked the Court not to rely on it. rejected his evidence on the point, not a credible witness. But the Court of Appeal It held that the advocate was In that case an advocate convinced his client to sign a document of guarantee as a guarantor when the advocate knew that although the document created an obligation, it would have no legal effect; In a suit based on that

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Mr. Rezida maintained, therefore, that the Transfer Deed is valid. Upon payment of the consideration the sum of Shs. 270,000=, being the purchase price, ownership in the suit property passed to the appellant and respondent on the registration of the Transfer Deed on 7-2-72.

the any mortgage. The learned Counsel contended that under section 42(4) of Registration of Titles Act, the effect of the Transfer Deed is that any person named in any Certificate of Title as the proprietor of the land therein described shall be deemed and taken to be the duly registered proprietor thereof . Section 51 of the Act further strengthens the position in that no instrument until registered in manner therein provided shall be effectual to pass any estate or interest in any land under the operation of that Act, or to render such land liable to

—v— Mr. Rezida argued that in the premises the learned trial Judge was correct in holding, on the authority of: John Ruhiga -v- Elias Rugyera & 2 Ors, Civil Appeal No. 1/88, Supreme Court, (unreported), that a person cannot be deregistered only on the ground that he had not paid the consideration for the transaction.

upon that According It is not disputed that the Transfer Deed, Exbt. Pl was drawn by the appellant as an Advocate, witnessed by one J. K. Patel (DW2) and that execution the suit property was duly transferred to the appellant and the respondent as tenants in common in equal share. The effect is a Certificate of Title was issued upon the registration of the appellant and the respondent as proprietors of the suit land as tenants in common with equal shares. According to the Transfer Deed the mortgage was executed one day after the purchase price had been paid to the seller. The loan of Shs. 200,000= was realised from the suit property.

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clear. a Act to modify the transaction. In those circumstances, it is difficult for me to believe that the appellant could have drawn the Transfer Deed adverse to his interest. As an experienced Lawyer he should have made his intentions He was free under section 209(1) of the Registration of Titles Transfer Deed to reflect the true position of the I am inclined to agree that this strange behaviour by Lawyer of the appellant's standing cast doubt on his credibility and rendered his testimony suspect.

I also considered the question of Shs. 3000= which was realised by way of rent from the suit property which amount was credited on the balance and became part and parcel of the purchase price but the respondent as a co-owner was denied half the share by the appellant yet they were tenants in common with equal shares. I believe the respondent was entitled to half that amount of rent in equal share.

Court; Besides there is a letter written by the appellant's Advocates to the respondent dated 13-9-90, Exbt P5 which was admitted in the trial it reads in part as follows

> "My Ref: No. JN/30/90 Hariprasad Rambai Patel c/o Cotton Wool Factory Vakah Vidynagar Via Anand District Kaira Gujarat State - India.

Re: PLOT NO. 19 BUGANDA ROAD - KAMPALA

We act on the instructions of our client B. K. Patel Esq. by which we address you as follows

As you are fully aware, the above property is co-owned by you and our client. When you left Uganda way back in 1972, the property was left in a very deplorable state. With a lot of vim, our client started injecting a lot of money into the property for its renovation. Presently the property is a very beautiful site, properly renovated, extended with a very beautiful garden..... "

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The above letter written about 18 years since the suit property was acquired in 1972, clearly admits and confirms that the respondent is a co-owner of the suit property. I agree with the finding of the learned trial Judge that the respondent is a co-owner who has duly paid his share of the suit property and the appellant was the person conducting the whole transaction as a Lawyer and friend. Accordingly, ground one of the appeal should fail in my view.

In ground 2, Mr. Nangwala the learned Counsel for the appellant submitted that the learned trial Judge erred in law in holding that no resulting trust was created in favour of the appellant when the appellant had solely met the purchase price of the property.

"Equity and the Law of Trusts" In support of his argument Mr. Nangwala relied on a passage in Trusts" by Philip H. Pettit, 6th Edition Butterworth, Chapter 8 at page 119 which states:

> "Whenever a man buys either real or personal property and has it conveyed or registered or otherwise put into the name of another, or of himself and another jointly, it is presumed that that other holds the property on trust for the person who has paid the purchase price."

It was his contention that the appellant who solely met the purchase price of the suit property though it was transferred in his name jointly with the respondent, the latter was holding the property on trust for the former on the principles of resulting trust.

On the other hand, Mr. Rezida for the respondent vehemently opposed the above submission. He contended that a resulting trust does not arise in the instant case. It is not correct in law to say that whoever pays trust money is the beneficiary of the resulting trust.

view learned as no shares. Rightly, in my view learned Counsel submitted that a resulting trust would only arise if there is no intention by the person paying the money that the other person being registered benefits. The co-purchaser as in the instant case must benefit and so resulting trust was created because the respondent paid for his Ground 2 of this appeal has no merit in my judgment.

owner see: -vch. 196. the Boustead, (1897) 1 ch.196. In the instant case, he submitted, that suit property was conveyed to the respondent as a trustee and who knew it was so conveyed to hold in trust for the appellant's daughter but has denied the trust and claimed the land himself. With regard to ground 3, the learned Counsel for the appellant submitted that the learned trial Judge erred in law when she held that the respondent had not got registered as of a half share of the suit property through fraud. He argued that it is fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself see: Rochefoucauld

Under section in his capacity as an advocate, attributable to the respondent or any party at all. 184 of the Registration of Titles Act, it would appear that an action for recovery of land can lie or be sustained only by a person deprived of any land against the person registered as proprietor of

such land through fraud. Mr. Rezida for the respondent opposed that submission said that there was no fraud on the part of the respondent against the appellant. The appellant must prove that the registration of the respondent's name was through fraud. Before the Transfer Deed, was registered, that document was duly drawn by the appellant In that document no fraud was

not a party to the suit; see: -v-Court, **Appeal No. 22 of 1992, Supreme** Moreover, the Counsel submitted that the In the instant case the daughter of the appellant is so that aspect of fraud would not arise as she would be the only person to complain of it see: **Bottlers Damanico (U) Ltd., Civil Appeal 1992**, (unreported). appellant did not complain of the alleged fraud except when the written statement of defence was amended and so it was an afterthought.

matters. or or Accordingly ground No. should fail. In the case before us it must be established that the respondent was registered as proprietor of the suit land through fraud. Fraud must be strictly proved and the standard of proof is higher than on the balance of probabilities as required in civil With respect, fraud was not attributable either directly by necessary implication to the respondent as the transferee. The respondent/transferee must be guilty of some fraudulent act must have known of such act by somebody else but took the advantage of such act which is not the case here. Accordingly ground No. 3

Under it was a document without force of law as it was not In his view the respondent purportedly revoked nothing. Regarding ground 4, Mr. Nangwala for the appellant submitted that the learned trial Judge erred in law when she held that there was an effectual power of attorney which could be revoked, section 154(1) Registration of Titles Act, the effect of a power of attorney begins on its registration which is a mandatory requirement. According to him there was no power of attorney capable of being acted upon; registered.

Mr. Rezida for the respondent in reply drew our attention to the letter dated 24-10-90, Exbt. P4, whereby on the instructions of the appellant his Lawyers wrote to the respondent's Lawyers and it reads in part as follows

> "M/s. Ayigihugu & Co. Advocates, Eagen House, KAMPALA.

Re: PLOT NO. 19 BUGANDA ROAD - KAMPALA

Your letter of even reference dated 18th October 1990, has been received and the contents therein communicated to our Mr. B. K. Patel who has instructed us to reply thereto as hereunder

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"We are surprised to learn that you question the improvements on the above property allegedly without consulting your client. You must be aware that our client was holding a general power of attorney in respect of the property from your client. There was no need of any prior consultations before anything could be done on the property.

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on That notwithstanding and since your letter was written with provoking audacity, we wish, at this point, to bring it to your attention that the said property was bought solely by our client and your client was only nominated by our client to be a It is our client who solely met the The two were never co-buyer. purchase price of the property. registered as co-owners but your client has bothered to pay what is due to our client in order to redeem his share. The Certificate of Title is with our client who claims equitable mortgage your client's fictitious share....."

I agree with the learned Counsel for the respondent that the above letter clearly admits that the appellant was managing the property in question by virtue of the power of attorney granted to him by the respondent. Therefore, whatever the appellant did on the property, he had relied on the appointment of that power of attorney.

as Mr. Rezida for the respondent submitted that under section 154(1) of the Act, non-registration does not make unregistered power of attorney invalid, in fact, it even allows the use of a power of attorney registered out of time. In addition, being a tenant in common with equal shares and the appellant being a Ugandan who had remained in Uganda at the time but who had the power of attorney to register it but did not, the learned Counsel said the learned trial Judge was correct in holding that justice should not be defeated by such technicalities as such failure to register power of attorney.

/12

of attorney the I find in the instant case that the power was not registered but the appellant acted on it by renovating property without giving notice to the respondent. In the premises the appellant is estopped from denying the existence of this power of attorney which he himself acted upon. Therefore, I would uphold the finding of the learned Judge that the power of attorney was revoked by the respondent by his letter dated 27-10-89, to the appellant, Exhibit P3, which was filed with the Registrar of Documents as No. 3530 dated 22-1-90.

a revocation of the Accordingly ground In effect after the registration of power of attorney the Registrar cannot give effect to any transfer or other instrument signed pursuant to the power. 4 should fail.

or at Ground 5 states that the learned trial Judge erred in law when she held that the respondent was entitled to a half share of the rent collected since 7th February, 1972, or at all.

found as a matter of The learned Counsel for the appellant submitted that had the learned trial Judge properly directed her mind she would have law that the respondent was barred under section 18 of the Limitation Act from demanding rents which fell due after the expiry of 6 years. Consequently if the respondent had paid half his share in the property, then he would be entitled only to rents from 1990 onwards when he made his claim.

and tenant. In reply Mr. Rezida for the respondent reiterated his stance on grounds 1, 2, 3 and 4 above, and agreed with the learned Judge for ordering the appellant to account for the rent so far collected since the respondent became proprietor of the suit property in 1972. However, the learned Counsel argued quite rightly in my view that section 18 Limitation Act is irrelevant and inapplicable in the instant case as it deals with recovery of rents or distress between landlord

/13

Patel (respondent) The appellant in his evidence at the trial according to the record was very evasive as to how much rent he had received from the suit property. However, I agree with the learned Judge's finding that since the respondent had paid for his share of the property, he is entitled to full benefits as proprietor. The Certificate of title - Exbt P2 describe the proprietors of Plot No. 19 Buganda Road, Kampala as Babubhai Kalidas Patel (appellant) and Hariprasad Rambhai as tenants in common in equal shares.

I see no merit in ground 5. The respondent is therefore entitled to the half of the rent collected from the date when he became proprietor of the suit property, hence

The last ground 6 states that having found out that the appellant had carried out renovations on the property, and having made the error referred to in ground 3 above, the learned trial Judge erred in law when she dismissed the appellant's counterclaim.

The learned Counsel for the appellant maintained his stance on ground one and reiterated that the counterclaim should have succeeded in view of prayer (b) thereto. In conclusion the learned Counsel prayed for the cancellation of the respondent's name so that the appellant remains registered as the sole proprietor of the suit property.

Mr. Rezida for the respondent opposed the above submission on the ground that it would be incredible to regularise fraud by cancelling the respondent's name, who is willing and *ready to pay half the cost of renovations provided the appellant has made good accountability of rent so far collected from the property since it was acquired.

In view of my finding that the respondent paid the purchase price, I am of the view that the counterclaim was rightly dismissed. Therefore, there is no merit in ground 6.

In the result I would dismiss the appeal with costs to the respondent.

DATED at Kampala This: Day of: 1997.

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

MANYINDO DC ^J ; S. G. ENGWAU*,J*; F. M. S. EGONDA-|CORAM:S. T. NTENDE,J.]

CIVIL APPEAL NO. 18 OF 1996

BABUBHAI KALIDAS PATEL APPELLANT

VERSUS

HARIPRASAD RAMBHAI PATEL RESPONDENT

No. 981 [Appeal arising from H. C. C. S. of 1996 at High Court of Uganda at Kampala before Hon. M. Kireju, J.].

JUDGMENT OF F. M. S. EGONDA NTENDE, J.

I have read the Judgement of S. G. Engwau, J. in draft and I agree that this appeal should be dismissed with costs.

Dated at Kampala this 21st day of February 1997.

F EGONDA-NTENDE J :s. GE.

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^a IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

(CORAM: S. T. MANYINDO DCJ, S. G. ENGWAU - J, EGONDA-NTENDE - J)

CIVIL APPEAL NO. 18 OF 1996

BETWEEN

BABUBHAI KALIDAS PATEL: APPELLANT AND

HARIPRASAD RAMBHAI PATEL: RESPONDENT

(Appeal arising from H. C. C. S. No. 981/96 at High Court of Uganda at Kampala before Hon. M. Kireju, J.).

JUDGMENT OF MANYINDO DCJ:

it. I read the judgment of Engwau, J. in draft and I agree with There can be no doubt that the respondent paid his part of the that on 13-9-90, the Advocate for (Exhb. P5) which reads purchase price. It is noteworthy the appellant wrote to the respondent a letter in part thus:

ii Re: PLOT NO. 19 - BUGANDA ROAD, KAMPALA

As you are fully aware, the above property is co-owned by you and our client. When you left Uganda way back in 1972, the property was left in a very deplorable state. With a lot of vim, our client started injecting a lot of money into the property for its renovation. Presently the property is a very beautiful site, properly renovated, extended with a very beautiful garden.

The total value of renovation and restructuring of the property made by our client is Ug. Shs. 63,143,230.00 valuation costs were Ug. Shs. 900,000=; painting costed 3,000,000=. Our client wishes us to bring it to your attention that as coowner you were obliged to meet half of that cost. In the premises we are instructed to demand from you the sum of Ug. Shs. 65,618,561= which is half of the cost incurred on the property together with interest thereon (half cost) at the rate of 35% p.a. for 1989 and 45% p.a. for 1990.

TAKE NOTICE that unless the said amount of Ug. Shs. 65,618,561/= is paid to our client within 15 days from the date hereof, we will advise our client to attach your half share in the said property in which he now claims equitable mortgage. Meanwhile note that we have strict instructions to invoke the legal machinery against you at your own risk as to costs (sic)."

On 18-10-90, the respondent replied through his Advocates, This was clearly The letter reads in part as follows: the property and costs thereof. at that and it appears that it was at that stage that he decided to deny the respondent his share in the property. brought out in his Advocate's reply to the respondent's Advocate dated 24-10-90. who requested for a detailed amount of the improvements made to The appellant was not amused

> "We are surprised to learn that you question the improvements made on the above property allegedly without consulting your client. You must be aware that our client was holding a general power of attorney in respect of the property from your client. There was no need of any prior consultations before anything could be done on the property.

That notwithstanding and since your letter was written with provoking audacity, we wish, at this point, to bring it to your attention that the said property was bought solely by our client and your client was only nominated by our client to be a cobuyer. It was our client who solely met the purchase price of the property."

If that was the true position then why would the appellant seek to recover the cost of renovating his own building from the respondent? Why would he threaten to attach the respondent's property in order to recover the respondent's cost of repairing the property? And finally, why did the appellant take so long to make the claim that the respondent had never paid his part of the purchase price? It seems clear to me that the appellant's turn about was an afterthought after his inflated claims for the renovations had been questioned by the respondent.

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I see no merit in the appeal and would dismiss it with costs to the respondent. As Egonda-Ntende, J. also agrees, it is so ordered.

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DATED at Kampala This: Day of: 1997.

S. T. MANYINDO DEPUTY CHIEF JUSTICE

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